

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

---

IN RE PHARMACEUTICAL INDUSTRY  
AVERAGE WHOLESAL PRICE LITIGATION

---

)  
)  
) CIVIL ACTION NO.  
) 01-12257-PBS  
)  
)

THE STATE OF FLORIDA

*ex rel.*,

VEN-A-CARE OF THE FLORIDA KEYS, INC., a  
Florida Corporation, by and through its principal officers  
and directors, ZACHARY T. BENTLEY and T. MARK  
JONES,

Plaintiffs,

)  
) CIVIL ACTION NO.  
) 05-11795-PBS  
)  
)

v.

ALPHARMA, INC.; ALPHARMA, USPD, INC., f/k/a  
BARRE-NATIONAL, INC.; BARRE PARENT  
CORPORATION; FAULDING, INC.; IVAX  
CORPORATION; IVAX PHARMACEUTICALS, INC.,  
f/k/a ZENITH-GOLDLINE PHARMACEUTICALS,  
INC.; MAYNE GROUP, LTD.; SANDOZ INC., f/k/a  
GENEVA PHARMACEUTICALS, INC.; NOVARTIS  
AG; AND PUREPAC PHARMACEUTICAL CO.,

Defendants.

---

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION  
TO PARTICIPATE IN JANUARY 27<sup>TH</sup> HEARING**

**BACKGROUND**

On January 10, 2006, Plaintiffs filed a Motion to Participate in the January 27,  
2006 hearing that this Court will hold with regard to motions filed by other states to have

cases they initiated remanded to state courts. The Defendants<sup>1</sup> in this Florida action oppose Plaintiffs' last minute motion to participate in the hearing. The issues presented by Plaintiffs' Motion for Remand do not require oral argument; indeed, until January 10<sup>th</sup> no party had requested argument on the motion.

Should the Court believe that a hearing would be helpful, the Defendants in this case would not oppose oral argument. However, judicial efficiency warrants that any hearing be delayed temporarily until such time as the Judicial Panel on Multidistrict Litigation (JPML) orders the transfer to this Court of Plaintiffs' factually and legally similar action against seven other companies.

For reasons that are unclear, Plaintiffs failed to mention that action in their motion. State of Florida, ex. rel., Ven-A-Care of the Florida Keys, Inc. v. Mylan Labs., Inc. et al., which was filed in state court on July 20, 2005. That case, like this action, has been removed to federal court. We understand that a Clerk of the JPML has advised the Defendants in that action that the JPML will soon issue an Order conditionally transferring that case to this Court. We also understand that on January 11, 2006, the State of Florida sought remand of that action to Florida state court.

As the Court is aware, Defendants removed this action from the State of Florida Circuit Court for the Second Judicial Circuit, in and for Leon County, to the United States District Court for the Northern District of Florida, Tallahassee Division on July 20,

---

<sup>1</sup> Not all of the named defendants have been served with process in this action. For those defendants who have not been served, their counsels' identification below indicates their consent to the positions set forth in this Memorandum. Such consent is not a waiver of service of process nor of any right to contest the exercise of personal jurisdiction.

2005. The action was subsequently transferred to this Court to join in these multidistrict proceedings without any opposition from the State of Florida Plaintiffs.

Prior to transfer, Plaintiffs had filed a remand motion in the Northern District of Florida. The parties agreed to rebrief the motion for remand before this Court and proposed a scheduling order under which further proceedings would be stayed until the motion is decided. This Court granted this proposed scheduling order on October 4, 2005. Plaintiffs filed their renewed memorandum of law on September 16, 2005, and the Defendants filed their opposition to Plaintiffs' motion on October 14, 2005. No party sought oral argument on the motion.

However, as the Court may not know, because Plaintiffs did not disclose it in their recent motion, Plaintiffs filed another action in Florida state court that is factually and legally similar to this action and which presents the same federal question. As noted above, that action has been removed to federal court in Florida. State of Florida, ex. rel., Ven-A-Care of the Florida Keys, Inc. v. Mylan Labs., Inc., (the "Mylan action").

Like this action, the Mylan action was removed from Florida state court to the Northern District of Florida. As noted above, we understand that a conditional transfer order will soon be entered by the JPML. Further, Plaintiffs have just filed, in the Northern District of Florida, a motion to remand the Mylan action to state court. However, given that notice of the Mylan action is already filed with the JPML, and that Plaintiffs previously did not oppose the transfer of the action involving the undersigned Defendants to this Court for coordinated pretrial proceedings (thus conceding that this

MDL is the appropriate forum for such actions), there is every reason to believe that the Mylan action will be transferred to this Court shortly.

### **ARGUMENT**

Defendants oppose Plaintiffs' request to participate in the January 27th hearing scheduled by this Court. In sum, it makes no sense for this Court to have a hearing on the now fully-briefed remand Motion that relates to the companies signing this pleading when the other defendants will want to be heard on the same matter once their case reaches the proper procedural posture.

First, the question whether federal jurisdiction exists (which it does), is fully demonstrated in the briefs. Plaintiffs (correctly) did not request oral argument when the motion was briefed, and nothing has changed to warrant a different conclusion.

Second, should the Court determine that argument would be helpful, judicial efficiency strongly suggests that argument be temporarily delayed until such time as the factually and legally similar Mylan action is transferred to this Court and all interested parties are able to participate in any hearing concerning whether the actions should be remanded to state court. Any resulting delay will be minimal as the Mylan action should be transferred to this Court shortly -- Plaintiffs did not oppose the transfer of this action from the Northern District of Florida to this Court and have conceded that this is the appropriate federal venue for these cases.

**CONCLUSION**

Plaintiffs' motion to participate in the January 27<sup>th</sup> hearing should be denied.

Respectfully submitted,

January 12, 2006

/s/John R. Fleder

JOHN R. FLEDER  
KIRK L. DOBBINS  
DARA S. KATCHER  
Hyman, Phelps & McNamara, P.C.  
700 Thirteenth Street N.W., Suite 1200  
Washington, D.C. 20005  
*Attorneys for Alpharma, Inc., Alpharma,  
USPD, Inc., f/k/a Barre-National, Inc.,  
Barre Parent Corporation, Purepac  
Pharmaceutical Co, Faulding, Inc. and  
Mayne Group, Ltd.*

/s/ Amber R. Anderson

PETER E. BALL (BBO # 546031)  
AMBER R. ANDERSON (BBO # 647566)  
Sally & Fitch LLP  
225 Franklin Street  
Boston, MA 02110  
*Attorneys for Alpharma, Inc., Alpharma,  
USPD, Inc., f/k/a Barre-National, Inc.,  
Barre Parent Corporation, Purepac  
Pharmaceutical Co., Faulding, Inc. and  
Mayne Group, Ltd.*

JAY B. SHAPIRO  
CHRISTOPHER L. BARNETT  
SAMUEL O. PATMORE  
Stearns Weaver Miller Weissler Alhadeff &  
Sitterson, P.A.  
Suite 200 – Museum Tower  
150 West Flagler Street  
Miami, FL 33130  
*Attorneys for IVAX Corporation and IVAX  
Pharmaceuticals, Inc.*

PETER ANTONACCI  
JONATHAN P. KILMAN  
GrayRobinson, P.A.  
301 South Bronough Street  
Suite 600 (32301)  
Post Office Box 11189  
Tallahassee, Florida 32302  
*Attorneys for Novartis AG and Sandoz, Inc*

WAYNE A. CROSS  
MICHAEL J. GALLAGHER  
PAUL OLSZOWKA  
SHERYL DICKEY  
White & Case LLP  
1155 Avenue of the Americas  
New York, NY 10036  
*Attorneys for Sandoz, Inc*

DENNIS P. ORR  
GRANT J. ESPOSITO  
MICHELLE J. ANNUNZIATA  
Mayer, Brown, Rowe & Maw LLP  
1675 Broadway  
New York, NY 10019  
*Attorneys for Novartis AG*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on January 12, 2006.

/s/Amber R. Anderson  
AMBER R. ANDERSON  
Sally & Fitch LLP  
*Attorneys for Alpharma, Inc., Alpharma,  
USPD, Inc., f/k/a Barre-National, Inc.,  
Barre Parent Corporation, Purepac  
Pharmaceutical Co., Faulding, Inc. and  
Mayne Group, Ltd.*